Supreme Court, U.S.
FILED
APR 20 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1364

In the Supreme Court of the United States

OCTOBER TERM, 1989

JESSE RICHARDSON, PETITIONER

v.

CITY OF CHICAGO AND UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General
JOHN R. DUNNE
Assistant Attorney General
DENNIS J. DIMSEY
MARIE K. MCELDERRY
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 633-2217

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether, under this Court's decision in *Marino* v. *Ortiz*, 484 U.S. 301 (1988), an individual who objects to entry of a consent decree but does not intervene in the lawsuit may appeal from the district court's order entering the decree.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	3
Conclusion	7

TABLE OF AUTHORITIES

Cases:

Bender v. *Williamsport Area School District*, 475 U.S. 534 (1986) 4

Hispanic Society of the New York City Police Dep't v. *New York City Police Dep't*, 806 F.2d 1147 (2d Cir. 1986), aff'd *sub nom. Marino* v. *Ortiz*, 484 U.S. 301 (1988) 4, 5, 7

Illinois v. *Sarbaugh*, 552 F.2d 768 (7th Cir. 1977) .. 5

International Marine Towing v. *Southern Leasing Partners*, 722 F.2d 126 (5th Cir. 1983) 6

Kenny v. *Quigg*, 820 F.2d 665 (4th Cir. 1987) .. 6

Marino v. *Ortiz*, 484 U.S. 301 (1988) 2, 3, 7

Martindell v. *International Tel. & Tel. Corp.*, 594 F.2d 291 (2d Cir. 1979) 5

Research Corp. v. *Asgrow Seed Co.*, 425 F.2d 1059 (7th Cir. 1970) 4

Sales v. *Marshall*, 873 F.2d 115 (6th Cir. 1989) . 6

Smartt v. *Coca-Cola Bottling Co.*, 337 F.2d 950 (6th Cir. 1964) 5

Tryforos v. *Icarian Development Co., S.A.*, 518 F.2d 1258 (7th Cir. 1975) 4

United States v. *LTV Corp.*, 746 F.2d 51 (D.C. Cir. 1984) 4

United States ex rel. Louisiana v. *Jack*, 244 U.S. 397 (1917) 3

West v. *Radio-Keith-Orpheum Corp.*, 70 F.2d 621 (2d Cir. 1934) 4

Wisniewski v. *United States*, 353 U.S. 901 (1957) .. 5

Statutes and rules: Page

Civil Rights Act of 1964, Tit. VII, 42 U.S.C. 2000e *et seq.* 1
Fed. R. App. P. 3(c) 3, 7
Fed. R. Civ. P. 24 4

In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1364

JESSE RICHARDSON, PETITIONER

v.

CITY OF CHICAGO AND UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The order of the district court approving the consent decree (Pet. App. 3-15) is unreported. The order of the court of appeals dismissing petitioner's appeal (Pet. App. 1-2) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 20, 1989. The petition for a writ of certiorari was filed on February 20, 1990 (a Tuesday following a Monday holiday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner sought to appeal the entry of a consent decree in final resolution of backpay and remedial seniority issues in this suit brought by the United States against the City of Chicago under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* The consent decree established an

interest-bearing back-pay fund of $9,229,212 to be distributed among four groups of persons adversely affected by the City's discriminatory employment practices. One such group was comprised of minority male incumbent patrolmen who applied for promotion to sergeant in 1968 and who were subsequently promoted by the City between March 24, 1972, and December 31, 1973. The decree also provided for adjustments in the seniority dates of those members of the affected groups whose hiring or promotion was delayed as a result of discrimination. Pet. App. 4-8.[1]

On June 5, 1989, the district court held a hearing on objections to the consent decree. C.A. Short App. 1-106. Petitioner, the highest ranking black police officer on the 1968 sergeants' eligibility list not to be promoted, filed written objections and appeared at the hearing as an objector. Pet. 3; C.A. Short App. 107-112. On June 7, 1989, the district court approved the decree. Pet. App. 3-15. It found that the settlement embodied by the decree is "fair, is based upon the record, is not arbitrary and capricious, and * * * serves the interests of those parties and persons for whom this litigation was brought and by whom it was defended." 6/7/89 Tr. 11.

Petitioner filed a timely notice of appeal from the June 7 order approving the consent decree. The United States filed a motion to dismiss petitioner's appeal for lack of jurisdiction, arguing that this Court's decision in *Marino* v. *Ortiz*, 484 U.S. 301, 303-304 (1988), precluded appeal by persons like petitioner, who were not parties to the lawsuit in the district court.[2] On that basis, the court of

[1] In addition, the decree provided a mechanism for persons not named in the decree but who believed they qualified for relief under it to file claims for inclusion. Pet. App. 6-7. Petitioner did not qualify for inclusion under this provision.

[2] After the United States moved in the court of appeals to dismiss petitioner's appeal, petitioner filed a motion in the district court for permission to intervene for purpose of appeal. That motion was denied on November 15, 1989, as untimely and is not at issue here.

appeals dismissed petitioner's appeal on November 20, 1989, in an unpublished. Pet. App. 1-2. DECISION

ARGUMENT

This Court's decision in *Marino* v. *Ortiz* is dispositive and required the dismissal of petitioner's appeal. Petitioner's attempt to distinguish his situation from that of the petitioners in *Marino* is unavailing. Accordingly, the petition presents no question warranting review by this Court.

1. In *Marino* v. *Ortiz*, white police officers appeared at a fairness hearing to object to the terms of a consent decree between minority officers and the City of New York settling a Title VII claim of discrimination in promotions. The white officers—who had not attempted to intervene either initially or for purpose of appeal—sought to appeal the district court's order approving the settlement. This Court rejected their appeal, stating that the "rule that only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment, is well settled." 484 U.S. at 304 (citing *United States ex rel. Louisiana* v. *Jack*, 244 U.S. 397, 402 (1917), and Fed. R. App. P. 3(c)).

In so ruling, this Court acknowledged the suggestion that exceptions may be possible to the general rule that only parties to an action can appeal a judgment. *Marino*, 484 U.S. at 304. Nevertheless, the Court determined that "the better practice is for such a nonparty to seek intervention for purposes of appeal." *Ibid.* Thus, the Court has already considered and rejected petitioner's argument (Pet. 6) that nonparties whose interests are affected by a district court judgment should not be required to go through the "mechanical filing of a petition to intervene" in order to appeal.

The rule confirmed by this Court in *Marino* is far preferable to that suggested by petitioner. Under petitioner's reasoning, every person filing an objection to a consent

decree in the district court is impliedly granted leave to intervene in the action, without meeting the criteria set out in Fed. R. Civ. P. 24, and without the original parties ever having an opportunity to address the propriety of intervention. In this case, petitioner's theory would result in the automatic granting of intervention to the more than 100 individuals who objected to the consent decree. Such a massive bypass of the intervention process would be unprecedented. The "better practice" recognized by this Court in *Marino* instead ensures that, before an individual may appeal from a judgment approving a consent decree and thus seek to upset a painstakingly negotiated agreement of the original parties to the litigation, he must at least satisfy the district court that he meets the criteria established by Rule 24. See *Hispanic Society of the New York City Police Dep't* v. *New York City Police Dep't*, 806 F.2d 1147, 1154 (2d Cir. 1986) (quoting *Bender* v. *Williamsport Area School District*, 475 U.S. 534, 548 n.9 (1986) (recognizing the importance of fulfilling the requirements for intervention)), aff'd *sub nom. Marino* v. *Ortiz*, 484 U.S. 301 (1988).

2. Even if this Court's opinion in *Marino* could be read as sanctioning some exceptions to the general rule that parties seeking to appeal must intervene below – and it cannot – petitioner can point to no putative exception that aids him. See Pet. 4-5. One set of cases in which appeals had been allowed before *Marino* "involve[d] appeals from orders which effectively bound a non-party despite its lack of party status in the trial court," *e.g.*, judgments in shareholder derivative suits and class actions in which shareholders and nonparty class members who have received notice of the pendency of the suits are bound. *United States* v. *LTV Corp.*, 746 F.2d 51, 53 (D.C. Cir. 1984). See, *e.g.*, *Tryforos* v. *Icarian Development Co., S.A.*, 518 F.2d 1258, 1263 n.22 (7th Cir. 1975) (shareholder derivative action); *Research Corp.* v. *Asgrow Seed Co.*, 425 F.2d 1059, 1060 (7th Cir. 1970) (class action); see also *West* v. *Radio-Keith-Orpheum Corp.*, 70 F.2d 621, 624 (2d Cir. 1934) (un-

secured creditor of corporation in receivership allowed to appeal judgment granting receiver's petition concerning corporation's assets, because receiver had made creditors "parties pro hac vice in order to protect itself" and creditors were bound by judgment). In this litigation, however, there was no certified class of which petitioner was a member nor is there any unusual circumstance which causes him to be bound by the judgment.[3]

In a second set of cases, the courts (again before *Marino*) have allowed appeals by litigants effectively treated as parties below. Thus, in *Smartt* v. *Coca-Cola Bottling Co.*, 337 F.2d 950, 951 (6th Cir. 1964), the appellants *had* moved to intervene in the district court; the district court simply never ruled on the motion. The district court, however, had considered and decided on the merits their motion to reconsider the dismissal of the lawsuit. The court of appeals determined that the district court had thus issued "an implied grant of leave to intervene." See also *Martindell* v. *International Tel. & Tel. Corp.*, 594 F.2d 291, 294 (2d Cir. 1979) (defendant waived objections to de facto grant of intervention by the district court by failing to raise them below); *Illinois* v. *Sarbaugh*, 552 F.2d 768, 772-773 (7th Cir. 1977)

---

[3] In any event, despite petitioner's reliance on *Tryforos* and *Asgrow Seed Co.*, the Seventh Circuit dismissed his appeal on the basis of this Court's decision in *Marino*. Even if petitioner could claim an intracircuit conflict (a difficult claim given the different facts of the cases), that conflict would not merit this Court's review. *Wisniewski* v. *United States*, 353 U.S. 901 (1957).

Analogously, we note that the Second Circuit does not consider the decision in *West* controlling on the right of appeal of objectors to settlement agreements. While it denied the City's motion for sanctions for prosecution of a frivolous appeal in *Hispanic Society*, 806 F.2d at 1154, it issued the warning that "any doubt as to the means by which objectors to class settlements should proceed in the future has been eliminated by this opinion."

(similar).[4] By contrast, this Court made clear in *Marino* that an objector to a consent decree who is allowed to present his or her concerns to the district court cannot thereby claim the status of a "party" to the litigation.[5]

Finally, in *Kenny* v. *Quigg*, 820 F.2d 665, 668 (4th Cir. 1987), the court of appeals allowed appeal under unique circumstances. The nonparty appellant had not only "participated significantly in the proceedings below, and had a substantial interest in the outcome of those proceedings," she had also dismissed her counterclaim in another suit in reliance on a fiduciary's compliance with a consent order entered in the suit below. Kenny was permitted to appeal even though she had not formally moved to intervene, when the Secretary of Labor in that suit failed to appeal the district court's order that the fiduciary had discharged its duties. Petitioner presents no such compelling circumstances to support his claim for treatment as a party, even assuming *arguendo* that *Kenny* remains good law in the wake of *Marino*.

3. Petitioner's suggestion that his situation can be distinguished from *Marino* based on the alternative holding of the court of appeals in that case is without merit. This Court's decision did not address that holding – that the non-

---

[4] In a like vein, the court of appeals in *International Marine Towing* v. *Southern Leasing Partners*, 722 F.2d 126, 129 (5th Cir. 1983), refused to dismiss an appeal by a nonparty in light of the district court's implicit allowance of intervention (by treating a nonparty as a party) and its own past leniency in allowing appeals in such situations. The court "stress[ed]," however, that "future litigants should not rely upon this decision as a means to circumvent the clear requirements of [Rule 24]." *Ibid.*

[5] Petitioner's reliance (Pet. 4 n.1) on *Sales* v. *Marshall*, 873 F.2d 115, 121 (6th Cir. 1989), is misplaced. The court of appeals ruled there that the nonparty appellant could not rely on the concept of de facto intervention where the district court had "categorically denied intervention" and had never treated appellant as a party.

party appellants were not aggrieved by the settlement because they would not be entitled to promotion even if the settlement were overturned (see *Hispanic Society*, 806 F.2d at 1152) – nor did the decision turn in any way on the merits of the white policemen's arguments. Rather, this Court held that they had no right to appeal under Fed. R. App. P. 3(c), because they had failed to take steps to become proper parties to the lawsuit (*Marino*, 484 U.S. Ct. at 304); that holding precludes petitioner's appeal here.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

KENNETH W. STARR
Solicitor General
JOHN R. DUNNE
Assistant Attorney General
DENNIS J. DIMSEY
MARIE K. MCELDERRY
Attorneys

APRIL 1990

U.S. GOVERNMENT PRINTING OFFICE 1990 – 262 203/00856